MOTION FILED
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(4)

No. 00-1491

In the Supreme Court of the United States

JOHN DEERE INSURANCE COMPANY,
Petitioner,

v.

GUILLERMO NUEVA AND LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITION BY JOHN DEERE INSURANCE COMPANY FOR A WRIT OF CERTIOIRARI

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IN THE SUPREME COURT OF THE UNITED STATES

John Deere Insurance Company,	)	
	)	
Petitioner,	)	No. 00-1491
	)	
v.	)	
	)	
Guillermo Nueva and Los Angeles County Metropolitan Transportation Authority,	)	
	)	
Respondents.	)	

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Now comes the Trucking Industry Defense Association (hereinafter "TIDA"), by and through its counsel, Dickie, McCamey & Chilcote, P.C. and Michael F. Nerone, Esq., and for its Motion for Leave to File *Amicus Curiae* Brief in Support of Petition for Writ of Certiorari states as follows:

1. TIDA is an international organization comprised of in-house counsel, claims and risk management professionals at trucking and truck insurance companies. The trucking companies span from common carriers to private fleets. TIDA provides assistance to the trucking industry on various issues regarding personal injury, property damage, and workers' compensation claims.

2. TIDA became aware of the existence and substance of the above-captioned litigation and, pursuant to Rule 37(2) of the Supreme Court of the United States, immediately contacted counsel for Respondents in order to obtain consent to file the *Amicus Curiae* Brief in Support of the Petition for Writ of Certiorari by John Deere Insurance Company.

3. TIDA has a vested interest in the outcome of this litigation due to the potentially significant ramifications this decision will have upon the trucking industry as a whole.

4. The office of the undersigned immediately attempted to gain verbal consent from the Respondents in order to file the *amicus curiae* brief. Upon first contact with counsel for Respondents, verbal consent to file the *amicus curiae* brief was granted.

5. Subsequently, counsel for Respondents contacted the office of the undersigned withdrawing her previous verbal consent to file the *amicus curiae* brief.

6. Counsel for John Deere Insurance Company has consented to the filing of the *amicus curiae* brief on behalf of TIDA.

7. The undersigned submits that granting the motion for leave to file the *amicus curiae* brief will enable TIDA to bring to the attention of this Honorable Court relevant matter not already brought to its attention by the parties.

8. The *amicus curiae* brief in support of the Petition for Writ of Certiorari addresses public policy considerations invoked by the decision of the Ninth Circuit

Court of Appeals, as well as the practical effects of that decision within the trucking industry.

9. The *amicus curiae* brief in support of the Petition for Writ of Certiorari also addresses the diversion of opinions between the various Circuit Courts of Appeals and the effect this diversion has upon the trucking industry.

10. The undersigned submits that the filing of this Motion for Leave and the attached *Amicus Curiae* Brief in Support of the Petition for Writ of Certiorari by John Deere Insurance Company has been made within the time limitations for filing set forth in Rule 37(3).

Respectfully submitted,

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QUESTION PRESENTED

The question presented in the petition by John Deere Insurance Company is:

> Whether the Form MCS-90 endorsement requires an insurer to indemnify third parties not covered by the terms of the applicable policy, even where there is no "final judgment . . . against the insured" named in the insurer's policy.

CORPORATE DISCLOSURE STATEMENT

The Trucking Industry Defense Association (TIDA) is an international organization comprised of in-house counsel, claims and risk management professionals at trucking and truck insurance companies. The trucking companies span from common carriers to private fleets. TIDA provides assistance to the trucking industry on various issues regarding personal injury, property damage, and workers' compensation claims.

TIDA maintains a vested interest in the outcome of this litigation due to its potentially significant ramifications throughout the trucking industry.

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PETITION FOR A WRIT OF CERTIORARI

Amicus Curiae Trucking Industry Defense Association (TIDA), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in this case is reported at 229 F.3d 853 (9th Cir. 2000), and is reprinted in the Appendix to the Petitioner John Deere Insurance Company's Petition for a Writ of Certiorari ("App.") at App. 1a. The opinion of the United States District Court for the Central District of California (Baird, J.) is unreported and is reprinted at App. 16a of the Petition for a Writ of Certiorari by John Deere Insurance Company.

JURISDICTION

The opinion of the Court of Appeals was issued on September 20, 2000. A timely petition for rehearing and rehearing *en banc* was denied on December 26, 2000. App. 34a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The ICC Termination Act of 1995 is codified at 49 U.S.C. §§13901-13908. Pertinent provisions are reprinted at App. 36a. The regulations promulgated thereunder are published at 49 C.F.R. §387.1 - .419. Pertinent provisions

are reprinted at App. 38a. The MCS-90 Endorsement, set forth at 49 C.F.R. §387.15, is reprinted at App. 39a.

STATEMENT OF THE CASE

Amicus Curiae, Trucking Industry Defense Association ("TIDA") is an international organization comprised of in-house counsel, claims and risk management professionals at trucking and trucking insurance companies. The trucking companies span from common carriers to private fleets. TIDA provides assistance to the trucking industry on various issues regarding safety, risk management, personal injury, property damage, and workers' compensation claims. TIDA has a vested interest in the outcome of this litigation due to the potentially significant ramifications this decision will have upon the industry as a whole.

TIDA hereby joins in the Statement of the Case previously set forth by John Deere Insurance Company in its Petition for a Writ of Certiorari in its entirety.

By way of further background, the trucking industry, as with the majority of national and worldwide industries, is comprised of large, medium, and small trucking companies, in addition to independent owner operators. Among the capital expenditures incurred by all trucking companies and independent owner operators are the purchases of the necessary equipment to engage in various activities within the trucking industry, such as intrastate and/or interstate freight transport. An integral part of any motor carrier operation is the implementation of adequate financial responsibility,, as mandated by federal law. All but the largest motor carriers satisfy their financial responsibility obligations through liability insurance coverage such as that obtained by Baljit Singh Sahota dba Sahota Trucking ("Sahota") from Petitioner

John Deere Insurance Company ("Deere") in the present matter.

Insurance companies calculate the premiums for trucking companies taking into account the MCS-90 Endorsement. The MCS-90 Endorsement requires insurers of motor carriers to make reimbursable indemnity payments up to the prescribed liability limits to satisfy judgments against those motor carriers. Up until the decision of the Ninth Circuit, trucking companies had been charged a premium for such insurance based upon the risk associated with a judgment being rendered against the insured trucking company. The amount of the premium is based upon a detailed history of the particular motor carriers' business operation, safety policies, evaluation of its drivers, as well as its loss history. The decision of the Ninth Circuit in this action effectively turns the trucking industry's underwriting analysis on its head by dramatically expanding the insurer's indemnity obligations to third parties who were not known nor contemplated when the premium was calculated.

The practical ramifications of the expanded scope of potential unknown/unanticipated insureds created by the Ninth Circuit's holding necessarily will result in increased premiums industry-wide to accommodate the expanded risks. Such increased premiums in an industry already burdened by high insurance costs and the recent dramatic increases in fuel costs will cause many smaller motor carriers to be unable to compete, will increase the costs of transporting freight and overall will have a significant negative impact, not only on the trucking industry, but also on the economy in general. As is made clear by the express language of the MCS-90 Endorsement and the pertinent federal regulations, this is neither the purpose nor the intent of the MCS-90 Endorsement.

In this action, a default judgment was rendered against Gurmukh Singh Garcha ("Garcha") and Blue Star Transportation ("Blue Star"), strangers to the Deere insurance policy. Significantly, no judgment has been rendered against Deere's insured, Sahota. Nonetheless, Respondents seek to impose an indemnity obligation for their default judgments against Garcha and Blue Star upon Deere. In reaching this outcome, the Ninth Circuit incorrectly employed the federally mandated MCS-90 Endorsement to rewrite the substantive terms and provisions of the Deere policy, despite the fact that the MCS-90 Endorsement did not conflict with the policy regarding the issue raised by Respondents.

Due to the nature of the trucking industry, this issue will consistently arise. This Honorable Court should therefore grant certiorari to review the opinion of the Ninth Circuit.

REASONS FOR GRANTING THE WRIT

I. THE MCS-90 ENDORSEMENT DOES NOT ALTER THE TERMS OF THE UNDERLYING POLICY OF INSURANCE AND IS NOT AVAILABLE FOR JUDGMENTS AGAINST A NON-INSURED.

As is set forth in 49 CFR §387.15, the MCS-90 Endorsement is separate and distinct from the underlying liability insurance policy. It only operates in circumstances where the terms of the underlying insurance policy would preclude an indemnity obligation which is required by the federal regulations set forth in 49 CFR §§387.1 - 387.17. Thus, the analysis of whether indemnity is owed for a

particular accident is two-fold. First, the language of the underlying policy must be reviewed to determine whether indemnity is owed. In this action, the Ninth Circuit correctly concluded that, pursuant to the language of the Deere policy, Deere has no indemnity obligation for the default judgment entered against Garcha and Blue Star.

Second, the language of the MCS-90 Endorsement, in conjunction with the related federal regulations, must be analyzed to determine whether indemnity is owed based upon the facts of the particular accident. It is respectfully submitted that neither the language of the MCS-90 Endorsement nor the related federal regulations mandate any indemnity obligation on behalf of Deere for the underlying accident. Although the language of the MCS-90 Endorsement expands the indemnity obligation with respect to non-scheduled vehicles, it does not in any manner alter or change the identity of those insured in the underlying insurance policy.

The definitions set forth in 49 C.F.R. §387.3 make clear that only the motor carrier named in the policy of insurance is an insured under the MCS-90 Endorsement. In this regard, the term "insured and principal" is defined in 49 C.F.R. §387.3 as,

> The motor carrier named in the policy of insurance, surety bond, endorsement, or notice of cancellation, and also the fiduciary of such motor carrier.

Id. Clearly the term "insured" for purposes of subpart 387.1-387.17 is the "motor carrier named in the policy of insurance . . . " When this definition is applied to the MCS-90 Endorsement, it is evident that no indemnity obligation to

non-insureds, such as Garcha and Blue Star, is owed under the MCS-90 Endorsement.

The Ninth Circuit's reasoning is flawed as it intermixes the unrelated concepts of "covered autos" and the determination of who is an insured. As stated above, Garcha and Blue Star fail to satisfy the requirements to be an insured under the policy, as well as the MCS-90 Endorsement. It is only by improperly rewriting the policy language that the Ninth Circuit reaches its conclusion. There is no language in the MCS-90 Endorsement nor in the related federal regulations that states or implies the policy language shall be altered, changed, or modified in any way. To the contrary, policy provisions which conflict with the indemnity obligations prescribed by the federal regulations are simply void and unenforceable.

Because the Ninth Circuit's holding is in direct conflict with the public policy expressed through the federal regulations and because that holding has such far reaching ramifications, this Honorable Court should grant certiorari.

II. THE DECISION BY THE NINTH CIRCUIT CONTRADICTS ITS PREVIOUS DECISION AND RATIONALE REGARDING THE MCS-90.

In its decision, the Ninth Circuit has expanded the definition of "insured" so as to permit the recovery of funds from an MCS-90 Endorsement when no judgment has been taken against the insured who purchased the policy, but rather, when only a default judgment exists against a non-insured. This rationale directly contradicts the previous rationale of the Ninth Circuit, as set forth in *Del Real v.*

United States Fire Ins. Crum & Forster, 64 F.Supp.2d 958 (E.D. Cal. 1998), *aff'd*, 188 F.3d 512 (9th Cir. 1999)(without published opinion). As can be seen, *Del Real* is factually similar to the case presently being considered.

In *Del Real*, the defendant insured a trucking company and truck leasing company which leased a trailer to Manke Trucking. Manke Trucking attached the leased trailer to its own tractor, which was operated by Gilbert Vidrios, a Manke Trucking employee. The Manke tractor and leased trailer were subsequently involved in a collision. The Estate of Del Real filed suit against Manke Trucking and Vidrios, and a consent judgment was entered. The estate then sought recovery from the defendant on the theory that the MCS-90 endorsement attached to the truck leasing company's policy required defendant to pay the judgment against Manke Trucking and Vidrios.

The Ninth Circuit, in disagreeing that the permissive users of the trailers invoke the MCS-90 endorsement stated:

> The language of the endorsement, the relevant federal regulations, and the interests of the parties all indicate that the term "insured" refers only to the named insured. In the MCS-90,
>
> > The insured agrees to reimburse the company for any payment made by the company on account of any accident, claim or suit involving a breach of the terms of the policy and for any payment that the company would not have been

> obligated to make under the provisions of the policy except for the agreement contained in this endorsement.
>
> It is unlikely that the term "insured" was intended to include lessors. Lessors are not parties to the insurance contract, and cannot be said to have knowingly entered into an agreement to reimburse the insurance company for payments made on the MCS-90 endorsement. The named insured cannot reasonably be understood to have agreed to reimburse the insurance company for payments made to judgment creditors of lessors. The relevant federal regulations reinforce the conclusion that only the named-insured is an "insured" under the endorsement; "insured and principal" are defined as "the motor carrier named in the policy of insurance, surety bond, endorsement, or notice of cancellation, and also the fiduciary of such motor carrier." 49 C.F.R. §387.5 (1994).

Del Real, 64 F. Supp. 2d at 964. In this factually identical case, the Ninth Circuit held the complete opposite and recognized that the MCS-90 does not alter the terms, conditions, and limitations of the policy. The Ninth Circuit also recognized that the language of the MCS-90 specifically requires that a judgment must be rendered against the insured prior to the invocation of the MCS-90 endorsement.

The decision of the Ninth Circuit presently under review, however, apparently ignored the rationale of *Del Real*, without addressing same. Due to the Ninth Circuit

ignoring its own prior rulings and rationale, the Petition for Writ of Certiorari should be granted.

III. THE DECISION BY THE NINTH CIRCUIT IS IN DIRECT CONFLICT WITH DECISIONS FROM OTHER CIRCUITS.

Not only does the Ninth Circuit obfuscate its prior rationale with respect to the obligations and scope of the MCS-90, but the decision by the Ninth Circuit directly conflicts with the precedents set forth in other Circuits.

In *Carolina Casualty Insurance Co. v. Insurance Co. of North America*, 595 F.2d 128, 139 (3d Cir. 1979), the Third Circuit Court of Appeals held that the BMC-90 Endorsement (predecessor to the MCS-90)[1] applied only to the named insured. In *Carolina*, Stanford was the owner of the tractor and was insured by Carolina. Refrigerated Transport Company, while insured by the Insurance Company of North America ("INA"), leased the tractor from Stanford. *Id.* at 130. Stanford provided a driver to Refrigerated Transport Co. in conjunction with the lease. The leased vehicle was involved in an accident while hauling cargo on behalf of Refrigerated Transport and while displaying the ICC placards of Refrigerated Transport. *Id.* at 129. The plaintiffs sued both Stanford and Refrigerated Transport, and the respective insurers filed separate declaratory judgment actions to determine coverage. *Id.* at 129-30.

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[1] The cases from the 1970s concern the "BMC-90" endorsement, while those since the early 1980s involve the successor form the MCS-90. *See Canal Ins. Co. v. First Gen'l Ins. Co.*, 889 F.2d 604, 611 (5th Cir. 1989).

In overturning the decision by the District Court and holding that the BMC-90 Endorsement attached to the INA policy imposed no obligations upon the INA (Refrigerate Transport's insurer) with respect to the permissive user Stanford, the Court reasoned:

> In the case before us, we find in particular that neither the federal motor carrier laws nor the (imputed) ICC endorsement nor paragraph 3 of Refrigerated's trip lease, transfer to Refrigerated the duties to defend claims properly brought against others or to pay judgments entered against others. 49 U.S.C. §315 (now 49 U.S.C. §10927) and 49 C.F.R. §1043.1(a), governing insurance and other assurances of motor carriers' financial responsibility, require only that the carrier give security 'to Pay any final judgment recovered against such motor carrier . . .; they mention nothing about defense of actions and nothing about payment of judgment recovered against the other parties such as lessors.

Id. at 139. Thus, INA was not responsible for any indemnity obligation on behalf of Stanford under the federal endorsement.

In *Wellman v. Liberty Mutual Ins. Co.*, 496 F.2d 131 (8th Cir. 1974), Liberty Mutual insured Morgan Drive-Away. Mitchell owned and operated the vehicle which had been leased to Morgan, and which displayed Morgan's ICC placards. *Id.* at 132. While operating the vehicle, Morgan was involved in an accident causing injury to Wellman. *Id.* Wellman commenced an action against Mitchell and Morgan. However, Morgan was dismissed from that action. *Id.* A

default judgment was taken against Mitchell, the owner-operator, and Wellman then attempted to collect from Liberty Mutual. *Id.*

The Eighth Circuit held that Mitchell was not covered under the Liberty Mutual policy, nor by the I.C.C. Endorsement:

> The relevant I.C.C. regulation on insurance, 49 C.F.R. §1043, contains no provision which would require a motor carrier specifically to carry insurance affording liability coverage for judgments rendered solely against an owner-operator of a vehicle leased to the motor carrier.

Id. at 138. Because no judgment was entered against Morgan, the I.C.C. Endorsement did not impose any indemnity obligation upon Liberty Mutual for the judgment against non-insured owner operator:

> Had the Wellmans obtained a state court judgment against Morgan, the result in this case would have been different, for the insurance policy would clearly have covered Morgan as the 'named insured' even though its liability would be vicarious and statutorily derived.

Id. at 139.

Similarly, in the present matter, the Respondents have taken a default judgment against the non-insured and now seek to impose an indemnity obligation under the MCS-90

Endorsement. Despite the fact that no judgment has been entered against the insured.

The diversion in opinion between the Third, Eighth and Ninth Circuits is readily apparent. In addition, other circuits have adopted the same rationale as the Third and Eighth Circuits, in direct conflict with the Ninth Circuit's decision in this case. *See White v. Excalibur Ins. Co.*, 599 F.2d 50, 55 (5th Cir. Cert.1979), *cert. denied*, 444 U.S. 965 (1979) (holding plaintiff could recover from the insurer under federal law only if she had obtained a judgment against the carrier Superior); *Nowak v. Transport Indem. Co.*, 120 Wis. 2d 635, 358 N.W. 2d 294, 296 (Wis. Ct. App. 1984) (holding a "final judgment recovered against the insured" refers only to a judgment entered against a named insured motor carrier); *Transport Indem. Co. v. Teter*, 575 S.W.2d 780, 785 (Mo. Ct. App. 1978) (rejecting the argument that the federal endorsement should be read in conjunction with the "Who Is An Insured" clause of the policy; rather, the endorsement stands on its own and is triggered only by a judgment against the named insured).

Similar to the cases cited above, a judgment has not been rendered against Deere's insured, Sahota. As these cases have held, the MCS-90 Endorsement is not applicable unless a judgment has been rendered against the named insured. Because the Ninth Circuit ignored the precedent of other Circuit Courts and ignored its own prior holding, certiorari should be granted.

IV. PUBLIC POLICY CONSIDERATIONS REQUIRE THAT THE NINTH CIRCUIT'S DECISION BE REVIEWED.

Common to all motor carriers are the acquisition costs of the tractor(s) and/or trailer(s). Also common to all legal motor carriers is the cost of liability insurance. Such insurance is one of the single most costly expenditures for many motor carriers.

Like other forms of insurance, liability insurance is based upon a calculation of risk. Of paramount importance in this analysis is the amount of risk as determined by the policy's monetary limits of liability, as well as the scope of risk as determined by numerous factors associated with the manner in which the insured operates. Among these factors, the insurers take into account the risk exposure created by the MCS-90 Endorsement. Creation of an indemnity obligation such as that effectuated by the Ninth Circuit's decision in the present matter, with the attendant additional risk for the conduct and activities of non-insureds whose business operation, safety policies, drivers, and loss history were completely unknown, dramatically distorts the accepted underwriting analysis. It effectively prevents an insurer from ever performing an accurate and comprehensive projection of risk. This is so because there are literally an infinite number of potential persons or entities who the insurer could be obligated to indemnify under the Ninth Circuit's holding. Clearly, as is set forth more fully above, this infinite scope of risk was not intended nor mandated by the applicable federal regulations.

The cost of insurance is passed on to the consumer in the form of higher transportation fees, and subsequent higher

prices to the consumers. Small and medium sized trucking companies, and on occasion even large trucking companies, however, encounter the difficulty of paying the initial premiums and then attempting to efficiently pass on the costs of this insurance. In many cases, the cost of the insurance is too great and the efficient transfer of these costs does not occur, resulting in the failure of the particular trucking company. Thus, the Ninth Circuit's decision works a manifest injustice upon the industry as a whole, as well as the economy in general.

Further, because indemnity payments made under the MCS-90 Endorsement are reimbursable, the Ninth Circuit's decision works an injustice on the named insured. In this case, a default judgment entered against non-insureds, Garcha and Blue Star, will result in the ultimate loss potentially being borne by the named insured, Sahota. Despite the fact that Sahota lacked the right and ability to defend or oppose the judgment and the fact that Sahota's conduct played no causal role in the occurrence of the accident, it will ultimately pay pursuant to the MCS-90 Endorsement. Such an anomaly and injustice is contrary to the scheme of mandatory insurance required by the federal regulations. Garcha and Blue Star were required to maintain adequate financial responsibility. If they failed to do so, it is inherently unjust to shift the responsibility for their conduct to parties who had only a single business transaction with them which was unrelated to the accident.

It is respectfully submitted that this case presents a compelling question previously unaddressed by this Honorable Court that has wide reaching public ramifications. Thus, certiorari should be granted so that the Ninth Circuit's decision can be reviewed and reconciled with the conflicting

authorities of the other Circuits and the plain language of the pertinent federal regulations.

CONCLUSION

Based upon the foregoing facts, authorities and arguments, it is respectfully submitted that the Petition for Writ of Certiorari by John Deere Insurance Company should be granted.

Respectfully submitted,

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